LIM SWEE CHENG & ANOR.

v.

MD. KASIMAN BIN KASMIN & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
TUAN HAIDAR BIN MOHD. NOOR J
[CIVIL CASE NO. 23-253 TAHUN 1991]
15 DECEMBER 1994

***TORT**: Road accident - Vehicles colliding from opposite directions - Conflicting versions - Reliance on documentary evidence - Question of liability.*

The plaintiffs claimed damages for injuries suffered as a result of a collision between motor lorry no. JL 8200 and the 1st plaintiff's motor van JBF 38 which were travelling from opposite directions along Jalan Johor Bahru - Pontian. At the material time the 1st plaintiff (PW2) was driving the motor van with the 2nd plaintiff (PW3), his father, as a passenger. They were proceeding towards Pontian market at about 1 p.m. to bid for fish when the motor lorry which was loaded with palm oil and driven by the 1st defendant (DW1) as the servant of the 2nd defendant collided into the motor van at around the 28 m.s. The parties both claimed encroachment and gave conflicting oral versions of the accident.

The evidence of the investigating officer, PW1, and the sketch plan and key drawn by him indicated that both vehicles were on their sides of the road respectively after the accident but broken pieces of glass were found on the path of the motor lorry. Photographs showed that the front offside of both vehicles were damaged. No brake marks were found on the road. DW1 denied encroaching onto the path of the motor van and claimed that PW2 overtook a taxi and caused the accident. PW2 admitted that there was a taxi in front of him but claimed to have applied the brake on seeing the motor lorry encroaching onto his path which was contradicted by the evidence of PW3 who said that the PW2 did not apply the brake but swerved to his left.

The question was whether the impact took place around the centre white line of the road or on the path of the motor van or motor lorry.

Held:

[1] It was more probable that PW2 was in fact in the process of overtaking the taxi when the accident occurred. There would appear to be no reason for DW1 to speed his lorry as it was fully loaded with palm oil and further it was in evidence that there were vehicles in front of DW1's motor lorry. There was therefore no plausible reason for DW1 to encroach onto PW2's path. There was evidence that the plaintiffs were going to Pontian market to bid for fish about 1 p.m. and had about 15 to 20 minutes to reach Pontian before the accident. Thus the irresistable inference is that the plaintiffs were in a hurry and PW2 must have driven his motor van at a great speed and must have in all probability overtaken the taxi at the material time and hence the collision.

[2] Having regard to the oral evidence of both parties in relation to the sketch plan and key together with the photographs produced, the collision took place well on the path of the motor lorry. It could not possibly have occurred somewhere in the middle of the road as Counsel for the plaintiffs seemed to suggest and thereby suggesting liability on 50:50 basis. DW1 has discharged the onus that he was not negligent. In the circumstances the plaintiffs' claim is dismissed with costs.

[Plaintiffs' claim dismissed with costs].

Cases referred to:
Lim Ewe Teik v. Ariffin b. Hussain [1990] 2 CLJ 191 ***(refd)***
Yahaya bin Mat & Anor. v. Abdul Rahman bin Abu [1982] 1 MLJ 202 ***(refd)***
Ong Yam Chong & Anor v. Chan Wah [1962] 28 MLJ 184 ***(refd)***

For the plaintiffs - R.K. Menon; M/s. R.K. Menon & Co.
For the defendants - K.S. Dass (Chandra Mohan with him); M/s. K. Sila Dass & Partners.

JUDGMENT

Haidar bin Mohd. Noor J:

In this action the plaintiffs are claiming damages for the injuries suffered by them including the total loss of motor van JBF 38 arising out of the motor accident between motor lorry No. JL 8200 and motor van JBF 38 on 8 August 1990 at about 12.45 p.m., near 28 m.s. Jalan Johor Bahru-Pontian.

The following documents were agreed:

Ikatan pliding - **P1**.

Ikatan Dokumen-Dokumen Plaintif - **P2**.

Ikatan Dokumen-Dokumen Tambahan - **P3**.

Ikatan Dokumen-Dokumen Tambahan - **P4**.

However, pp. 25 to 29 of P2 were not agreed.

The following special damages on 100% liability were agreed by the parties:

In respect of the 1st plaintiff - RM29,330

In respect of the 2nd plaintiff - RM 1,467

At the time of the accident, tthe 1st plaintiff (PW2) was driving motor van JBF 38 in which his father, the 2nd plaintiff (PW3) was travelling as a passenger. They were proceeding from the direction of Johor Bahru towards Pontian after doing their business selling fish in Johor Bahru. Accroding to PW1 they were proceeding back towards Pontian and a about 1.00 p.m. that day they would go to the Pontian market to bid for fish. The motor van JBF 38 belonged to PW2. The motor lorry JL 8200 driven by he 1st defendant as the servant of the 2nd defendant. In fact it was an oil tanker loaded with palm oil meant for delivery to Pasir Gudang. 1st defendant was travelling from Benut to Pasir Gudang when at around 28 m.s. Jalan Johor Bahru-Pontian he met with an accident with the motor van JBF 38 driven by PW2. Both vehicles were then travelling in the opposite direction.

The plaintiffs claimed that the motor vehicle driven by the 1st defendant encroached onto their path whereas the 1st defendant claimed that PW2 encroached onto his path. Thus we have a situation of two oral conflicting versions of how the accident occurred. In such a situation the photographs, sketch plan and measurements of the scene and the nature of the damages to each vehicle must provide the most reliable guide by which their versions can be tested (See *Lim Ewe Teik v. Ariffin b. Hussain* [1990] 2 CLJ 191).

The plaintiffs called Sgt. Major 56411 Musa bin Razali, (PW1), as their witness. PW1 was the officer who investigated the accident and drew the sketch plan and the key (Exhibits P5 and P5K). According to PW1 the road surface at that time was not wet and there was a slight bend at that area and there was a central dotted white line in the middle of the road. PW1 found broken pieces of glasses on the lest side of the road as one faces Johor Bahru

and this means that those broken pieces of glasses were found on the path of the motor lorry. This is shown in P5 (see 'Z' in P5). In addition thereto blood stains were also found on the path of the motor lorry (see 'X' in P5). PW1 also said that the windscreen of both vehicles were broken and he did not find any brake marks on the road. The motor van JBF 38 was on the left side as one faces Pontian and the motor lorry JL 8200 was on the left side as one faces Johor Bahru. In other words both vehicles were on their sides of the road respectively after the accident. The photographs of both vehicles would seem to show that the front offside of both vehicles were damaged, indicating the point of impact (see pp. 28 and 29 of P2). The question is whether the impact took place around the centre white line of the road or on the path of the motor van or on the path of the motor lorry.

According to PW2 and PW3 when they first saw the motor lorry it was encroaching onto their path. They did not say that the motor lorry was overtaking any vehicles and in the circumstances either the motor lorry went out of control or DW1 was negligent in driving his motor lorry onto the path of PW1's motor van. However, DW1 in his evidence denied encroaching onto the path of PW2's motor van and claimed that PW2 overtook a taxi and thereby caused the accident. It was suggested also to PW2 and PW3 that PW2 was speeding at the material time in which both of them denied.

It was admitted by PW2 that there was a taxi in front of him. Looking at the sketch plan and the key and considering the evidence of PW2, it is more probable to my mind that PW2 was in fact in the process of overtaking the taxi when the accident occurred. There would appear to be no reason for DW1 to speed his lorry as it was fully loaded with palm oil and further it was in evidence that there were vehicles in front of DW1's motor lorry. There was therefore no plausible reason for DW1 to encroach onto PW2's path. There was evidence that the plaintiffs were going to Pontian market to do the bidding for fish at about 1.00 p.m. and they had about 15 to 20 minutes to reach Pontian before the accident and the irresistable inference is that the plaintiffs were in a hurry and PW2 must have driven his motor van at a great speed and must have in all probability overtaken the taxi at the material time and hence the collision. PW2 further said that he applied the brake on seeing the motor lorry encroaching onto his path. There was no evidence of this on P5 (See evidence of PW1). In fact PW3 said in his evidence that PW2 did not apply the brake but he did swerve to his left. This would be more consistent with PW2 overtaking the vehicle in front of him and then swerving to his left. In all probability there was insufficient time and in so overtaking the collision occurred on the path of the motor lorry. This again is supported by the broken glass found on the path of the motor lorry. The broken glass would probably fall almost at point of impact (See *Yahaya bin Mat & Anor. v. Abdul Rahman bin Abu* [1982] 1 MLJ 202).

In my view having regard to the oral evidence of both parties in relation to the sketch plan and the key together with the photographs produced, the collision took place well on the path of the motor lorry. It could not possibly have occurred somewhere in the middle of the road as Counsel for the plaintiffs seemed to suggest and thereby suggesting liability on 50:50 basis. I am of the opinion that DW1 had discharged the onus that he was not negligent (See *Ong Yam Chong & Anor v. Chan Wah* [1962] 28 MLJ 184).

In the circumstances, regretably the plaintiffs' claim is dismissed with costs.